No. SC85175

IN THE

MISSOURI SUPREME COURT

STATE EX REL. FORD MOTOR COMPANY, KENNETH KING, BILLY GENSLER, CHARLES HITT AND AMERICAN FAMILY INSURANCE COMPANY

Relators,

-vs-

THE HONORABLE MICHAEL P. DAVID, JUDGE
CIRCUIT COURT FOR THE CITY OF ST. LOUIS, MISSOURI

Respondent.

RELATORS' BRIEF

SHOOK, HARDY & BACON L.L.P.
Robert T. Adams (MoBar #34612)
Paul A. Williams (MoBar #43716)
Douglas W. Robinson (MoBar #50405)
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105
(816) 474-6550
(816) 421-4066
Attorneys for Relators

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

CASES

RULE

STATUTE

CONSTITUTION

II. JURISDICTIONAL STATEMENT

This action involves the question of whether Respondent, Honorable Michael P. David, can take any further action except to transfer the underlying case, Case No. 012-00563 entitled Pierce v. Ford Motor Company, et al., from the Circuit Court of St. Louis, City to a county where venue is proper. In her Petition, plaintiff named both corporations and individuals as defendants. Although American Family resides in the City of St. Louis, the subject insurance policy does not provide plaintiff with a cause of action against American Family and, accordingly, all claims against American Family are pretensive and should be dismissed. Because none of the remaining defendants named in plaintiff's Amended Petition are residents of the City of St. Louis and the cause of action did not accrue in St. Louis, venue is improper in the Circuit Court of St. Louis, City pursuant to Mo. Rev. Stat. § 508.010. This Court has jurisdiction of this writ proceeding under Article V, Section 4 of the Missouri Constitution.

III. STATEMENT OF FACTS

At issue is whether a lawsuit involving a workplace accident and defendants with no connection to the City of St. Louis can be brought in the City of St. Louis based on claims made against the plaintiff's automobile insurance policy which provides no coverage for the unassembled vehicle involved or the subject accident.

According to the facts relied on by Judge Neill in the Order which is the subject of this Brief, on September 7, 1997, the decedent Benjamin Pierce was killed as a result of injuries sustained in an accident at the Ford Hazelwood assembly plant in St. Louis County. (Honorable Margaret M. Neill's[1] Order and Partial Judgment at 1) (Cir. Ct. St. Louis City Nov. 18, 2002) (Writ Exhibit A.)[2] Relators King, Gensler and Hitt were making "design adjustments" on the Ford Explorer, "which was to be shipped for use in Australia, when the vehicle accelerated forward, hitting Mr. Pierce and dragging him forward until it collided with another vehicle." (Id.) After her husband's death, plaintiff Sara Pierce ("plaintiff"), filed for workers' compensation for which she receives monthly payments. (Writ Exhibit H, Nos. 13, 14.)

---

[1] The Honorable Margaret M. Neill was the Presiding Judge who issued the subject Order. The Honorable Michael P. David is the current Presiding Judge.

[2] All exhibits referred herein were attached to Relators' Suggestions in Support of their Petition filed on March 25, 2003.

On or about February 22, 2001, plaintiff filed a Petition commencing the present wrongful death action against Relators. (Writ Exhibit B.)[3] According to the Petition, the accident occurred in St. Louis County. (Id. at ¶ 5.) Relator Gensler was a resident of St. Charles County. (Id. at ¶7.) Relator King was a resident of St. Charles County (Id. at ¶ 8.) Relator Hitt was a resident of Jefferson County. (Id. at ¶ 9.)

At the time of the subject incident, the decedent was insured under a policy of automobile insurance (the "Policy") issued by Relator American Family. (Writ

[3] Prior to this lawsuit, plaintiff filed a similar lawsuit against these defendants and Teleflex Automotive a/k/a Plymouth Stamping Company in the Circuit Court of St. Louis City. In that case, the trial court entered an order transferring this lawsuit to St. Louis County, and dismissing the uninsured motorist claim against American Family. On reconsideration, the Court vacated the Order in so far as it did not consider plaintiff's Amended Petition, allowing plaintiff to continue to sue American Family on the additional claims of medical payments and accidental death. The Court stated it would be appropriate for American Family to challenge the sufficiency of the pleadings. The claims against Ford, the individual defendants, and Teleflex Automotive remained in St. Louis County. On January 3, 2001, plaintiff voluntarily dismissed the pending action in St. Louis County, and subsequently filed the present lawsuit against Ford, American Family and the individual defendants. (A copy of the relevant Court Order dismissing the previous lawsuit is attached as Writ Exhibit C.)

Exhibit D.) The Medical Expense Coverage of the Policy provides: "we [American Family] will pay reasonable medical expenses for appropriate and necessary medical and funeral services performed within one year of the accident because of an accident related bodily injury to an insured person." (Writ Exhibit D at Part II, p. 2.) An "insured person" is defined in relevant part as "you or any relative while occupying, or when struck by, a highway vehicle or trailer. (Id. at Part II, Additional Definition No. 6, p. 3.) (emphasis added.) The Medical Expense Coverage of the policy excludes coverage for bodily injury to any person "during the course of employment if benefits are payable or must be provided under our workers' compensation or disability benefits law or any similar law." (Id. at Part II, Exclusion No. 6, p. 3) (emphasis added.) At the time of the accident, the subject automobile insurance did not provide for Accidental Death Coverage. (Writ Exhibit D.) In the event the accident is deemed to be covered by a subsequently issued policy containing Accidental Death Coverage, the coverage defines an "insured person" as "you or any relative while occupying, or when struck by, a land motor vehicle or trailer." (Writ Exhibit I at Additional Definition No. 2, p. 1) (emphasis added.)

On March 29, 2001, Relators Ford, King, Hitt, and Gensler filed a Motion to Transfer For Improper Venue and Suggestions in Support. (Writ Exhibit E.)[4] The

[4] The pertinent exhibits attached to the original motions, suggestions, responses, and replies are already included in Relators' Suggestions in Support of their Petition

motion asserted American Family was pretensively joined in the lawsuit for the purpose of establishing venue in the City of St. Louis because the insurance policy issued by American Family to the decedent did not provide coverage for the subject incident and the alleged causes of action against American Family as a matter of law. (See generally Writ Exhibit E.)

On May 9, 2002, Judge Neill denied without prejudice Relators' Motion to Transfer For Improper Venue. (Writ Exhibit F.) Judge Neill found that venue was premised solely on American Family residing in the City of St. Louis, (Id. at p. 2), but denied the motion as premature because American Family had not filed a motion to dismiss. (Id. at p. 4.)

On May 22, 2002, American Family filed a motion to dismiss. On May 28, 2002, Relators Ford, King, Gensler, and Hitt filed a motion to reconsider the Court's Order denying their motion to transfer. (Writ Exhibit G.)[5]

---

filed on March 25, 2003, therefore, Relators have excluded these exhibits as a convenience to the Court.

[5] The pertinent exhibits attached to the original motions, suggestions, responses, and replies are already included in Relators' Suggestions in Support of their Petition filed on March 25, 2003, therefore, Relators have excluded these exhibits as a convenience to the Court.

On November 18, 2002, Judge Neill granted defendant American Family's Motion to Dismiss as to plaintiff's uninsured medical claim (Writ Exhibit A; Writ Exhibit B at Count X), and denied its motion as to plaintiff's claims under the medical payment and accidental death provisions of the policy (Writ Exhibit A; Writ, Exhibit B at Counts XI and XII, respectively.) Judge Neill denied Relators Ford, King, Gensler, and Hitt's motion to reconsider due to the claims remaining against American Family.

It is undisputed that the accident giving rise to the cause of action involved in this lawsuit did not occur in the City of St. Louis, and Ford and the individuals named as defendants do not establish venue in the City of St. Louis. Rather venue under R.S.Mo. § 508.010 is premised solely on American Family residing in the City of St. Louis.

All of plaintiff's claims against American Family are based on an automobile insurance policy issued to the decedent covering four automobiles which have no relevance to the present lawsuit. (Writ Exhibit D.) Plaintiff alleges three claims against American Family: (1) uninsured motorist; (2) medical payments; and (3) accidental death benefits. (Writ Exhibit B at Counts X, XI, XII.) However, the record and pleadings do not support a cause of action under any of these claims. The insurance policy was issued to cover automobile accidents on roadways – not accidents involving non-registered vehicles undergoing design adjustments which have not left the assembly plant. The subject accident does not involve a vehicle while being used on the highways of Missouri – <u>it involves an accident which occurred during the assembly of a vehicle for</u>

use in Australia. Judge Neill previously held the uninsured motorist coverage did not apply and dismissed this claim. (Writ Exhibit A.) Venue is pretensive because the remaining claims against defendant American Family are without merit. This Court should enter an Order transferring this action to a forum where venue is proper and dismiss the remaining claims against American Family.

IV. POINT RELIED ON

RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN THE UNDERLYING CASE OTHER THAN TO TRANSFER IT TO A COUNTY WHERE VENUE IS PROPER BECAUSE PLAINTIFF HAS PRETENSIVELY JOINED AMERICAN FAMILY IN THAT PLAINTIFF HAS NO CAUSE OF ACTION AGAINST AMERICAN FAMILY FOR MEDICAL EXPENSES OR ACCIDENTAL DEATH BENEFITS UNDER THE SUBJECT POLICY.

V. STANDARD OF REVIEW

Relators seek this Writ on the ground Respondent has misconstrued or misapplied the law with respect to venue pursuant to Mo. Rev. Stat. § 508.010. An appellate court reviews the trial court's decision on a de novo basis where it is claimed the trial court misconstrued or misapplied the law. See, e.g., McGhee v. Dickson, 973 S.W.2d 847, 848 (Mo. banc 1998); Fishman v. Joseph, 14 S.W.3d 709, 715 (Mo. Ct. App. 2000).

VI. ARGUMENT

If venue is improper in the county where an action is brought, prohibition lies to bar the trial court from taking any further action, except to transfer the case to a county of proper venue. State ex rel. Reedcraft Mfg., Inc. v. Kays, 967 S.W.2d 703, 704 (Mo. Ct. App. 1998); State ex rel. Quest Comm. v. Baldridge, 913 S.W.2d 366, 371 (Mo. Ct. App. 1996).

When a lawsuit is brought against one or more corporations and one or more individuals, the General Venue Statute, R.S.Mo. § 508.010, applies. Futrell v. Ouhr Bros., Inc., 916 S.W.2d 348, 352 (Mo. Ct. App. 1996). Under Section 508.010, venue is proper where any defendant resides or where the cause of action accrued.

"If a plaintiff pretensively joins a defendant to gain venue, then venue is improper and the cause must be transferred." Lynch v. Blanke Baer & Bowey Krimko, 901 S.W.2d 147, 153 (Mo. Ct. App. 1995). Joinder of a defendant is pretensive where (1) the pretensive nature of the joinder of the defendant appears on the face of the pleadings, and (2) where there is in fact no cause of action against the resident defendant. State ex rel. Malone v. Mummert, 889 S.W.2d 822, 824-25 (Mo. banc 1994); Hefner v. Dausmann, 996 S.W.2d 660, 663 (Mo. Ct. App. 1999). The test is disjunctive – the Court need only find either prong applies. Hefner, 996 S.W.2d at 663. The Court must look to the record and the state of the pleadings at the time the challenge is adjudicated in order to determine if venue is pretensive. Id. at 663-64. A writ of prohibition is proper when

joinder of a defendant is pretensive. State ex rel. Toastmaster v. Mummert, 857 S.W.2d 869, 872-73 (Mo. Ct. App. 1993).

Respondent based the decision solely on the presence of American Family in the City of St. Louis. Plaintiff alleges American Family maintains offices for the usual and customary transaction of business in the City of St. Louis, Missouri. (Writ Exhibit B at ¶ 11.) No other parties are alleged to reside in the City of St. Louis, Missouri. (Id. at ¶¶ 7, 8, 9 and 10.) The accident giving rise to this cause of action occurred in St. Louis County, Missouri. (Id. at ¶ 5.) The alleged claims in plaintiff's Petition based on the Policy and the record in existence at the time the challenge was adjudicated do not state a claim against American Family. As such, joinder of American Family was pretensive and Judge Neill exceeded her jurisdiction by not transferring this matter to a proper forum and dismissing the claims against American Family.

A. Plaintiff's Claims Under the Policy

Plaintiff alleges three claims against American Family under the Policy: (1) uninsured motorist; (2) medical payments; and (3) accidental death benefits. (Writ Exhibit B at Counts X, XI and XII.) Judge Neill dismissed plaintiff's uninsured motorist claim, concluding the subject Ford Explorer was not a vehicle subject to Missouri's Motor Vehicle Financial Responsibility Laws and was not an "uninsured motor vehicle." (Writ Exhibit A at 9) (emphasis added.) Judge Neill further stated the Ford Explorer was not "street legal" in the state of Missouri (Id. at 7) and acknowledged "the Explorer was not being operated as a vehicle for transportation purposes on a public road, but was

being propelled along an assembly line, for purposes of making design alterations necessary for its origination and release for eventual sale." (Id. at 9.) Thus, the only claims remaining for purposes of this Writ are the Medical Expense and Accidental Death claims. (Writ Exhibit B at Counts XI and XII.)

1. Plaintiff has no cause of action under the Medical Expense Coverage of the Policy.

a. The subject Ford Explorer is not a "highway vehicle" under the insurance policy.

The medical expense claim (Count XI) fails to state a justifiable claim under the Policy and Missouri law. The Medical Expense coverage provides: "we [American Family] will pay reasonable medical expenses for appropriate and necessary medical and funeral services performed within one year of the accident because of an accident related bodily injury to an insured person." (Writ Exhibit D at Part II, p. 2) (emphasis added.) An "insured person" is defined in relevant part as "you or any relative while occupying, or when struck by, a highway vehicle or trailer." (Writ Exhibit G at Part II, Additional Definition No. 6, p. 3) (emphasis added.)

Based on the facts alleged in plaintiff's Petition, it is clear the decedent was not an "insured person" at the time of the accident. Coverage is available only when the insured is struck by a "highway vehicle." The subject Ford Explorer was not a "highway vehicle" because it was not completely assembled and not registered for use on Missouri highways. Instead, this partially assembled Ford Explorer was undergoing "design adjustments" and bound for use in Australia. Judge Neill acknowledged this in

dismissing plaintiff's uninsured motorist claim (Writ Exhibit A at 1, 7), and further noted the subject "Ford Explorer was not being operated as a vehicle for transportation purposes on a public road, but was being propelled along an assembly line." (Writ Exhibit A at 9) (emphasis added.) The same reasoning should apply equally to the medical coverage claim. See Toastmaster, 857 S.W.2d at 871-72.

b. The worker compensation exception prohibits the Medical Expense Coverage of the Policy.

In her order, Judge Neill stated there was no evidence in the record that a workers' compensation claim was pending. (Writ Exhibit A at 10.) However, Plaintiff previously admitted filing for workers' compensation for which she receives monthly payments. (Writ Exhibit H at Nos. 13, 14.) This information was verified under oath by plaintiff prior to the adjudication of the venue challenge. No further evidence is necessary.

The Policy excludes "bodily injury" to any person "during the course of employment if benefits are payable or must be provided under a workers' compensation or disability benefits law or any similar law." (Writ Exhibit D at Policy, Part II, Exclusion No. 6, p. 3) (emphasis added.)

The subject accident occurred while the decedent was working at Ford's assembly plant. (Writ Exhibit B at ¶ 15.) The accident allegedly occurred after the defendant employees installed carpet on the floor console of the subject Explorer. (Id. at ¶ 16-23.) The decedent was injured "during the course of employment." (Writ Exhibit

D.) Plaintiff's benefits are obviously "payable or . . . provided [for] under a workers compensation" law based on the allegations in the Petition.

The public policy behind workers' compensation laws would also be jeopardized if American Family's automobile insurance is extended to work-place accidents. The purpose of workers' compensation laws is "to provide financial and medical benefits to the victims of work-connected injuries . . . and to allocate the financial burden to the most appropriate source, the employer, and, ultimately the consumer." Thomas v. City of Springfield, 88 S.W.3d 155, 159 (Mo. Ct. App. 2002). The denial of the present writ of prohibition would undermine the purposes of workers' compensation laws. In essence, a denial of the present writ would extend automobile insurance to vehicle assembly line accidents, accidents which are and should continue to be covered by traditional workers' compensation laws. A denial would also allocate the financial burden of work-place accidents to automobile insurance providers, in addition to the employer. Such an allocation would only result in higher automobile insurance premiums for the consumer.

2. Plaintiff has no cause of action for Accidental Death Benefits.

a. The subject Ford Explorer is not a "land motor vehicle" under the insurance policy.

At the time of the accident, the subject automobile insurance did not provide for Accidental Death Coverage. (Writ Exhibit D.) The policy in place at the time of decedent's death contains no language which indicates Accidental Death Coverage was provided. Instead, plaintiff relies on a subsequent policy containing

Accidental Death Coverage. Assuming that the subsequent policy applies to this case, the subject Ford Explorer is not a "land motor vehicle" under the subsequent policy, and thus plaintiff's claim fails.

Under the Accidental Death coverage an "injured person" is defined as "you or any relative while occupying, or when struck by, a land motor vehicle or trailer." (Writ Exhibit I at Additional Definition No. 2) (emphasis added.) For the same reasons it was not a "highway vehicle," discussed supra section 1.a, the subject Ford Explorer is not a "land motor vehicle" under both the subject Policy and Missouri law. The subject Ford Explorer was not a "land motor vehicle" because it was not completely assembled and not registered for use on Missouri highways. Judge Neill's reasoning in dismissing the Uninsured Motorist claim is equally applicable to the Accidental Death claim.

3. The Terms "Land Motor Vehicle" and "Highway Vehicle" are Not Ambiguous.

The terms "land motor vehicle" and "highway vehicle" are not ambiguous. In Toastmaster v. Mummert, 857 S.W.2d 869 (Mo. Ct. App. 1993) this Court held an exclusionary clause in the policy "clearly and unambiguously exclude[d] coverage for an off-road accident involving a forklift." Id. at 872. The exclusionary language found in the Toastmaster policy stated a "motor vehicle" does not mean a vehicle "which is a farm-type tractor or equipment designed for use mainly off public roads while so used." Id. at 871. Like the exclusionary language in Toastmaster, there is no ambiguity in the terms "land motor vehicle" and "highway vehicle" in the subject Policy.

According to Judge Neill, both the terms "land motor vehicle" and "highway vehicle" are ambiguous because the policy is unclear whether it refers to a vehicle operated on a highway, subject to being operated on a highway, or merely designed for highway use. (Writ Exhibit A at 10, 12.) Judge Neill's Order ignores the mandate found in Toastmaster which states language found in insurance policies must be given its plain meaning, consistent with the reasonable expectations, objectives, and intent of the parties. Toastmaster, 857 S.W.2d at 872. Courts cannot create an ambiguity to distort the language of an unambiguous insurance policy. Krombach v. Mayflower Ins. Co., Ltd., 829 S.W.2d 208, 210 (Mo. banc 1992).

The plain meaning of the terms "land motor vehicle" and "highway vehicle," when viewed in the context of the subject insurance policy, cannot mean anything other than a completely manufactured vehicle capable of being driven on a highway, road, or other traffic way. In dismissing the Uninsured Motorist claim, Judge Neill reasoned the subject Ford Explorer was not being operated as a vehicle for transportation purposes on a public road but was being propelled along an assembly line. (Writ Exhibit A at 9.) The same reasoning establishes the terms "land motor vehicle" and "highway vehicle" are unambiguous. No party could have "reasonably expected" a policy of automobile insurance to cover an accident involving a vehicle still on the assembly line.

4. Coverage for Unassembled Vehicles is Unwarranted Under the Public Policy of Missouri's MVFRL.

"The plain purpose of the MVFRL is to make sure that people who are injured on the highways may collect damage awards, within limits, against negligent motor vehicle operators." Shelter Mut. Ins. Co. v. Gebhards, 947 S.W.2d 132, 133 (Mo. Ct. App. 1997) (emphasis added). This protection extends to an insured vehicle's occupants, operators and occupants of other vehicles, and pedestrians. Distler v. Reuther Jeep Eagle, 14 S.W.3d 179, 182 (Mo. Ct. App. 2000). The purpose of the of the MVFRL is clear – automobile insurance is meant to protect those injured in vehicular accidents on Missouri's highways and roads. Automobile insurance protection does not extend to assembly plants. To extend automobile insurance to assembly plants would be contrary to the purposes of the MVFRL and the general intent behind automobile insurance policies, as well as infringe upon the workers' compensation statute.

5. Ford Complied With All Statutory Procedural Requirements.

Plaintiff argues the Relators waived a venue challenge because they never challenged venue pursuant to Rule 51.045(a). Plaintiff argues Relators' Motion to Transfer for Improper Venue[6] was untimely filed. Plaintiff went so far as to file an affidavit by the circuit clerk in support of her proposition that the motion was untimely because the docket was changed on August 23, 2001 to reflect the fact the motion was filed with the Court on April 2, 2001.

As Relators' counsel disclosed at the hearing on this matter, the motion was timely filed with the Court on April 2, 2001, along with their answers, but the motion included a prior closed case number. After plaintiff's counsel indicated the only reason

he had not filed any response to the motion was that it was filed in the wrong case, Relators' counsel contacted the Court and informed them of the mistake. The clerk subsequently made the correction in the docket to reflect the fact the motion was filed with the Court on April 2, 2002.

A motion to transfer venue is timely if filed within the time period allowed for responding to an adverse party's pleading or, if no responsive pleading is permitted, within thirty days after service of the last pleading. Mo. R. Civ. P. 55.045(a). Relators satisfied this requirement. An inadvertent mistake does not deprive Relators of their right to challenge venue and to have this case heard in a court where venue is proper and which has some logical connection to the subject matter of this lawsuit. See Borello v. Adams, 975 S.W.2d 188, 191 (Mo. Ct. App. 1998) (default judgment set aside for "good cause shown" where attorney in filing answer "inadvertently" put the wrong case number on the answer and therefore answer was filed in a closed case). Accordingly plaintiff's argument that Relators have waived this venue challenge is without merit.

VII. CONCLUSION

For the reasons set forth above, plaintiff's claims against American Family should be dismissed because the subject Policy does not provide plaintiff with a cause of action against American Family. Because none of the remaining defendants are residents of the City of St. Louis and because the cause of action did not arise in the City of St. Louis, venue under § 508.010 is improper in the City of St. Louis. Relators respectfully request this Court to make its Preliminary Writ permanent and prohibit Respondent from

---

[6] Writ Exhibit E.

taking any further action in this case other than dismissing the claims against American Family and transferring the remaining claims to a proper forum.

SHOOK, HARDY & BACON L.L.P.

By_____
Robert T. Adams, #34612
Paul A. Williams, #43716
Douglas W. Robinson, #50405

One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105-2118
Telephone No: 816/474-6550
Facsimile No: 816/421-4066

ATTORNEYS FOR RELATORS
FORD MOTOR COMPANY, KENNETH KING, BILLY GENSLER, AND CHARLES HITT

_____
Robert Danis, #35426
1807 Park 270, Suite 200
St. Louis, Missouri 63146
Telephone No: 314-542-0015
Facsimile: 314-432-0361
St. Louis, Missouri 63146

ATTORNEY FOR AMERICAN FAMILY

CERTIFICATE PURSUANT TO RULE 84.06(c)

The undersigned hereby certifies that this brief contains the information required by Rule 55.03, complies with the requirements of Rule 84.06(b), and contains 4,990 words. The undersign further certifies the enclosed disk has been scanned for viruses and is virus free.

_____

Attorneys for Relators

Signature of this filing certifies a copy of the foregoing was mailed via First Class, U.S. Mail, postage prepaid this ____ day of _____, 2003, to:

The Honorable Michael P. David
Division 1, Circuit Court of the
City of St. Louis
10 North Tucker Boulevard
St. Louis, Missouri 63103
RESPONDENT

Leonard P. Cervantes, Esq.
Michael J. McDonnell, Esq.
Phillip A. Cervantes, Esq.
Cervantes & Associates
1007 Olive, Fourth Floor
St. Louis, Missouri 63101
Telephone No: 314/621-6558
Facsimile No: 314/621-6705
ATTORNEYS FOR PLAINTIFF